470A

(28)

Supreme Court, U.S.
FILED
OCT 2 4 2006
OFFICE OF THE CLERK

No. 05-1120

In the

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE ENVIRONMENTAL PROTECTION AGENCY

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTIONS PRESENTED

Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), authorizes the Administrator of the Environmental Protection Agency (EPA) to set emission standards for any "air pollutant" from new vehicles which in the Administrator's "judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

1. Whether the EPA Administrator properly exercised his discretion not to issue carbon dioxide emission standards for new motor vehicles under section 202(a)(1).

2. Whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants for climate change purposes under section 202(a)(1).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. PETITIONERS LACK CONSTITUTIONAL STANDING TO BRING THIS SUIT 3

A. Petitioners Cannot Establish a Causal Link Between EPA's Failure to Regulate CO2 from New Motor Vehicles Under the Clean Air Act and Rising Sea Levels in Massachusetts. 4

B. Petitioners Cannot Establish a Likelihood That the Requested Relief Will Redress the Alleged Injury. 8

II. CONGRESS DID NOT INTEND TO REGULATE CO2 FOR GLOBAL WARMING PURPOSES UNDER THE CLEAN AIR ACT 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Food and Drug Administration v. Brown and Williamson Tobacco Corp., 529 U.S. 120 (2000) 10-12, 15

Massachusetts v. Environmental Protection Agency, 415 F.3d 50 (D.C. Cir. 2005) 4, 10

Rapanos v. United States, 126 S. Ct. 2208 (2006) 1

Steel Company v. Citizens for a Better Environment, 523 U.S. 83 (1998) 3

Whitmore v. Arkansas, 495 U.S. 149 (1990) 3

Statutes

42 U.S.C. § 7521(a)(1) ..... i, 4

Federal Register

68 Fed. Reg. 52922 (Sep. 8, 2003) 5-9, 12-15

Rules

Supreme Court Rule 37 1

Supreme Court Rule 37.6 1

Miscellaneous

Centre for Sun-Climate Research of the Danish National Space Center, *Influence of Cosmic Rays on the Earth's Climate*, http://spacecenter.dk/xpdf/influence -of-cosmic-rays- on-the-earth.pdf (last visited Oct. 19, 2006) 7

National Research Council, *Climate Change Science: An Analysis of Some Key Questions* (2001) 5

TABLE OF AUTHORITIES—Continued

Page

News from spacecenter.dk, *Getting Closer to the Cosmic Connection to Climate* (October 4, 2006) http://spacecenter.dk/cgi-bin/nyheder-m-m.cgi?cgifunction=form|id=1159917791udsk=1 (last visited Oct. 19, 2006) 8

Royal Society, *Experimental Evidence for the Role of Ions in Particulate Nucleation Under Atmospheric Conditions*. http://www.journals.royalsoc.ac.uk/(di31e045tuhy54mkqnrgjiiy)/app/homecontribution.asp?referrer=parent&backto=issue,12,46; journal, 1,133;linkingpublicationresults,1:102023,1 (last visited Oct. 19, 2006) 7

Senator James Inhofe, Chairman, Senate Environment and Public Works Committee, Senate Floor Speech, Delivered Monday September 25, 2006, *Hot and Cold Media Spin Cycle: A Challenge to Journalists Who Cover Global Warming*, http://epw.senate.gov/repwhitepapers/HOT%20AND%20COLD%20MEDIA%20SPIN%20CYCLE.pdf (last visited Oct. 19, 2006) 8

IDENTITY AND INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondent United States Environmental Protection Agency. Written consent was granted by counsel for all parties and lodged with the clerk of this Court.

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has litigated numerous cases addressing a balanced approach to environmental regulation including this Court's recent decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

PLF's analysis of the standing issue and the intent of Congress will provide a valuable and necessary viewpoint to assist the Court in resolving this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is not a referendum on global warming. This Court need not pass judgment on whether the climate change phenomenon is real or conjectural, natural or manmade, or benign or cataclysmic. Instead, this Court must determine if the Petitioners have standing to sue and then, if necessary, whether Congress intended to regulate carbon dioxide, a naturally

---

[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for any party authored any part of this brief and no person or entity made a monetary contribution for the preparation or submission of this brief.

occurring substance necessary for life, as a toxic air contaminant under the Clean Air Act.

The answer to both questions is no.

Although Petitioners assert they will suffer harm from the effects of global warming—such as sea level increases causing erosion on state beaches—if the Environmental Protection Agency does not classify carbon dioxide as an air pollutant under the Clean Air Act and limit new car emissions, Petitioners are unable to establish a causal link between the alleged harm and the agency's inaction. Of equal importance, carbon dioxide emissions from new cars are already regulated by the Department of Transportation—not the Environmental Protection Agency—to the maximum extent authorized by Congress under the so-called CAFE standards which establish mandatory fuel efficiency requirements for automakers. Therefore, the Environmental Protection Agency has no power to address the Petitioners' concerns. Thus, without the ability to show causation and redressability, Petitioners cannot satisfy Article III standing requirements under the United States Constitution.

Even if Petitioners had standing to bring this suit, Congress never intended to address global warming through piecemeal legislation like section 202(a)(1) of the Clean Air Act, which even under the broadest reading would encompass only a narrow component of global warming effects. Rather, Congress has taken a more comprehensive approach to the matter—an approach that recognizes the magnitude of global warming concerns worldwide, the need for greater scientific certainty, the potential social and economic upheaval a global warming response will generate, the national and international political implications of carbon dioxide regulation, the effect of a unilateral American response on third world countries, and the absolute necessity of a coordinated global warming strategy.

Concerns which could not be addressed by rote application of the Clean Air Act.

The simple fact is that Congress has assiduously refused to adopt a regulatory approach to control carbon dioxide emissions in the United States. Surely, Congress could not have intended to remedy global climate change—one of the most far-reaching and controversial issues of our age—without an express statutory statement to that effect.

ARGUMENT

I

PETITIONERS LACK CONSTITUTIONAL STANDING TO BRING THIS SUIT

The right to maintain a suit in federal court is based on establishing standing under Article III of the United States Constitution. As this Court has recognized, a lack of standing deprives the court of jurisdiction to decide the case: "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). The "constitutional minimum of standing" is characterized by three requirements. *Id.* at 102. First, Petitioners must ultimately prove, not merely allege, "an injury in fact." *Id.* at 103. They must identify a particularized harm that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Second, they must establish causation whereby they show "a fairly traceable connection between" the Petitioners' alleged injury and the conduct of the Defendant to which Petitioners complain. 533 U.S. at 103. And third, Petitioners must establish redressability. That is, they must show "a likelihood that the requested relief will redress the alleged injury." *Id.*

In this case, the lower court was split on the standing issue. Judge Randolph was willing to assume, for purposes of the

case, that Petitioners did have standing because he would rule against the Petitioners on the merits anyway. *See Massachusetts v. Environmental Protection Agency*, 415 F.3d 50, 56 (D.C. Cir. 2005). However, Judge Sentelle found the alleged injury was too general, amounting to nothing more than a claim that global warming is "harmful to humanity at large" and that "[p]etitioners are or represent segments of humanity." *Id.* at 60. On the other hand, Judge Tatel determined that at least one of the Petitioners alleged more particularized injuries; Based on rising sea levels, "Massachusetts claims an injury—namely, loss of land within its sovereign boundaries—that 'affects [it] in a personal and individualized way.'" *Id.* at 65.

But even if one petitioner has satisfied the "injury in fact" requirement of Article III standing, Petitioners cannot satisfy the other two requirements of causation and redressability.

A. Petitioners Cannot Establish a Causal Link Between EPA's Failure to Regulate CO2 from New Motor Vehicles Under the Clean Air Act and Rising Sea Levels in Massachusetts

In this case, Petitioners challenge the Environmental Protection Agency's decision not to designate carbon dioxide as an "air pollutant" under section 202 (a)(1) of the Clean Air Act and adopt standards to regulate carbon dioxide for global warming purposes. That section provides:

> The Administrator [of the EPA] shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicle[s] . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1).

Petitioners rely on modeling studies and affidavits contending with absolute certitude that human-caused greenhouse gases, like carbon dioxide, "are accelerating global climate change and that emissions of these compounds from motor vehicles contribute to the problem." 68 Fed. Reg. 52922, 52930 (Sept. 8, 2003). But the Environmental Protection Agency determined that this information was available to the National Research Council (an arm of the prestigious National Academy of Sciences) when it came to a different conclusion. *Id.* In its searching 2001 report, *Climate Change Science: An Analysis of Some Key Questions*, the Council concluded that the current state of knowledge was uncertain and that global warming models are inherently unreliable:

> [B]ecause of the large and still uncertain level of natural variability inherent in the climate record and the . . . time histories of the various forcing agents (and particularly aerosols), a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.

68 Fed. Reg. 52930 (citing the NRC report at 17).

The National Research Council cautioned that "current estimate[s] of the magnitude of future warming should be regarded as tentative and subject to future adjustments" and that "[r]educing the wide range of uncertainty inherent in current model predictions of global climate change will require major advances in understanding and modeling." *Id.* (citing the Council report at 1.)

As the National Research Council explained, the difficulty in predicting climate change derives from a number of complex economic and physical factors, including the predictability of human-caused greenhouse gas emissions, what happens to emissions in the atmosphere, the radiative properties of the atmosphere, changes in cloud cover and ocean circulation,

changes in day and evening temperatures, shifts in rain and storms, and impacts on human health. *See id.* (citing the Council report at 20). If climate change models are to be reliable, uncertainties must be reduced relative to:

- The future global use of fossil fuels and future global emissions of methane,
- The fraction of fossil fuel carbon that will remain in the atmosphere and contribute to radiative forcing versus exchange with the oceans or with the land biosphere,
- The impacts (either positive or negative) of climate change on regional and local systems,
- The nature and causes of the natural variability of climate and its interactions with human-induced changes, and
- The direct and indirect effects of the changing distribution of aerosols.

68 Fed. Reg. at 52930.

Thus, the National Research Council concluded that "substantial scientific uncertainties limit our ability to assess each of these factors and to separate out those changes resulting from natural variability from those that are directly the result of increases in anthropogenic [human-caused] GHGs [greenhouse gases]." *Id.*

In other words, the objective and independent conclusions of the National Research Council make clear that Petitioners *cannot* establish Article III causation. The high level of scientific uncertainty relative to global warming precludes Petitioners from showing "a fairly traceable connection between" the Petitioners' alleged injury (sea level increases on the Massachusetts coast) and the conduct of the Defendant (the agency's decision not to regulate carbon dioxide from new

vehicles under the Clean Air Act) to which Petitioners complain.

Indeed, a recent study supports these conclusions.

On October 3, 2006, the Royal Society, the British equivalent of our National Academy of Sciences, published a study online entitled *Experimental Evidence for the Role of Ions in Particulate Nucleation Under Atmospheric Conditions*. http://www.journals.royalsoc.ac.uk/(di31e045tuhy54mkqnrgjiiy)/app/home/contribution.asp?referrer=parent&backto=issue,12,46;journal,1,133;linkingpublicationresults,1:102023,1 (last visited Oct. 19, 2006). The study was produced by the Centre for Sun-Climate Research of the Danish National Space Center. According to the backgrounder provided by the Space Center, http://spacecenter.dk/xpdf/influence-of-cosmic-rays-on-the-earth.pdf (last visited Oct. 19, 2006), the study proves a decade-old theory that cosmic radiation greatly affects low-level cloud cover on the Earth. This is significant because "low-level clouds cover more than a quarter of the Earth and exert a strong cooling effect at the surface." *Id.* According to the study, so strong is this effect that

> [t]he 2% changes in low cloud cover in just 5 years . . . should vary the heating at the Earth's surface by an average of about 1.2 watt per square metre. That figure can be compared with about 1.4 watt per square metre estimated by the [United Nations] Intergovernmental Panel on Climate Change for the greenhouse effect of *all the increase in carbon dioxide in the air since the Industrial Revolution.*
>
> *In 1900 the cosmic rays were generally more intense than now and most of the warming during the 20th Century can be explained by a reduction in low cloud cover.*

Id. (emphasis added)

This startling conclusion suggests that human-caused carbon dioxide emissions may have an insignificant effect on global warming.[2] The link between cosmic radiation and low-level cloud formation constitutes "a missing link in climate theory," News from spacecenter.dk, *Getting Closer to the Cosmic Connection to Climate* (Oct. 4, 2006) http://spacecenter.dk/cgi-binnyheder-m-m.cgi?cgifunction=form|id=1159917791udsk=1 (last visited Oct. 19, 2006), and demonstrates how little is known about the factors influencing global climate change. Even if this study is not determinative on the subject, it puts in doubt the assumptions about the causes of global warming on which the current climate models are based and on which Petitioners rely to establish causation. On the current state of the scientific record, it is impossible for Petitioners to prove a causal connection between sea level rises off the Massachusetts coast and the Environmental Protection Agency's decision not to regulate carbon dioxide emissions from new vehicles under the Clean Air Act.

B. Petitioners Cannot Establish a Likelihood That the Requested Relief Will Redress the Alleged Injury

Petitioners ask this Court to direct the Environmental Protection Agency to determine if carbon dioxide is an "air pollutant" under the Clean Air Act. They assume that if carbon dioxide is determined to be an "air pollutant" that it will result in increased federal regulation of carbon dioxide which will reduce global temperatures and, presumably, retard or eliminate

---

[2] For a comprehensive analysis of the debate surrounding global warming assumptions *see* http://epw.senate.gov/repwhitepapers/HOT%20AND%20COLD%20MEDIA%20SPIN%20CYCLE.pdf (last visited Oct. 19, 2006): *Hot and Cold Media Spin Cycle: A Challenge to Journalists Who Cover Global Warming*, Senator James Inhofe, Chairman, Senate Environment and Public Works Committee, Senate Floor Speech, Delivered Monday September 25, 2006.

sea level rises along the coast of Massachusetts. But Petitioners are operating on a false assumption. Even if the Environmental Protection Agency were to designate carbon dioxide as an "air pollutant," the agency cannot further regulate the substance from new vehicles under the Clean Air Act.

According to the Environmental Protection Agency, there is no known technology to reduce carbon dioxide from vehicle emissions except by increasing fuel economy. *See* 68 Fed. Reg. at 52929 ("No technology currently exists or is under development that can capture and destroy or reduce emissions of CO2, unlike other emissions from motor vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of CO2 is to improve fuel economy."). And fuel economy is regulated by the Department of Transportation under the Energy Policy and Conservation Act, not by the Environmental Protection Agency under the Clean Air Act.

In the Energy Policy and Conservation Act Congress itself has "set mandatory standards governing the fuel economy of cars and light duty trucks." *Id.* At the time the Environmental Protection Agency decided not to designate carbon dioxide as an "air pollutant," the level of fuel economy statutorily authorized by Congress was the 27.5 miles per gallon corporate average fuel economy (CAFE) standard. *Id.* That standard applies to model years 1984 and beyond. *Id.* The Department of Transportation—not the Environmental Protection Agency—is allowed to modify the standard for any given year, but Congress retains a veto power over any changes, ostensibly to ameliorate economic impacts on automakers and consumers. *Id.* Under the Act, the Deapartment of Transportation may only set standards that automakers "meet on a fleetwide basis." *Id.* "Automakers thus have flexibility to design different vehicle models having different fuel economy so long as the average of the vehicles sold by the automaker in a given model year and class meets the CAFE standard for that year." *Id.*

In short, the Energy Policy and Conservation Act provides "the only statutory vehicle for regulating the fuel economy of cars and light trucks." *Id.* The Environmental Protection Agency cannot impose controls on carbon dioxide emissions under the Clean Air Act that require higher fuel economy standards than those mandated by Congress under the Energy Policy and Conservation Act. And, to set lower standards would serve no purpose. Thus, this Court cannot provide any redress to Petitioners in this case. Therefore, the Court has no jurisdiction under Article III and the case must be dismissed.

II

CONGRESS DID NOT INTEND TO REGULATE CO2 FOR GLOBAL WARMING PURPOSES UNDER THE CLEAN AIR ACT

The strongest evidence that Congress did not intend to address global warming through section 202(a)(1) of the Clean Air Act is that the Act includes no such expression of intent. The Environmental Protection Agency has acknowledged the undeniable importance of this issue: "We agree with the President that 'we must address the issue of global climate change.'" 68 Fed. Reg. 52929. The worldwide social, political, and economic implications of our response to global warming are immense. The Petitioners themselves have filed two volumes of declarations some of which "predict catastrophic consequences from global warming." *Massachusetts*, 415 F.3d at 54. It is highly unlikely, therefore, that Congress would have intended to leave an issue of such magnitude to a general provision of the Clean Air Act that was never designed to address global concerns and without an express statement that the provision should be so broadly applied.

This Court came to the same conclusion in a similar case: *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In that case, the Food and Drug Administration (FDA) sought to apply the Food, Drug,

and Cosmetic Act to tobacco and tobacco products. *Id.* at 120. Although the Act did not expressly allow the regulation of tobacco, the Act did authorized the FDA to regulate "drugs" and "devices." *Id.* at 120. The FDA determined that nicotine was a "drug" and cigarettes and smokeless tobacco were "devices" that deliver nicotine to the body and thus were subject to federal regulation under the Act. *Id.* Moreover, the FDA felt a need to provide strict controls on tobacco use: "According to the FDA, '[m]ore than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease.'" *Id.* at 134-35. "The agency also determined that the only way to reduce the amount of tobacco-related illness and mortality was to reduce the level of addiction, a goal that could be accomplished only by preventing children and adolescents from starting to use tobacco." *Id.* at 127-128. The FDA's regulations were therefore designed to protect minors.

Nevertheless, this Court reversed the FDA's determination. Even though the statutory language had apparently been satisfied, this Court found that the Act did not cover tobacco use. This Court based its decision on the fact that Congress directly regulated tobacco under other statutes and that the agency was asserting jurisdiction for the first time to regulate an industry constituting a significant portion of the American economy. *Id.* at 159-160. This Court concluded: "[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

While acknowledging that tobacco use among children "poses perhaps the single most significant threat to public health in the United States," this Court counseled:

> [N]o matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, . . . an administrative agency's power to

> regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

Id. at 161 (citation omitted.).

So it is here. Even if carbon dioxide satisfies the statutory definition of an "air pollutant" under the Clean Air Act, carbon dioxide emissions are already being addressed to the maximum extent practicable under the Department of Transportation's CAFE standards for fuel efficiency, as discussed in detail above. And of course, it is precisely because of petitioner-like claims that global warming "poses perhaps the single most significant threat" to public health and welfare that a more comprehensive approach—than the regulation of new vehicle emissions under the Clean Air Act—is warranted. Indeed, the Environmental Protection Agency has documented just such an approach:

> [T]he President has laid out a comprehensive approach to climate change that calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development so that the government may effectively and efficiently address the climate change issue over the long term.

68 Fed. Reg. at 52930.

In 2001, the President announced the Climate Change Research Initiative "to study areas of uncertainty and identify priority areas where investments can make a difference." *Id.* The strategic plan for this initiative has been issued and is being pursued. *Id.* at 52930-31. Recently, the Department of Transportation promulgated new rules increasing the CAFE standards for light trucks, including sport utility vehicles. *Id.* at

52931. These new standards will avoid 31 million metric tons of carbon dioxide emissions over the life of the affected vehicles. *Id.* The President has established public-private partnerships with automakers to promote zero-emission hydrogen powered vehicles and sought billions of dollars in tax credits for consumers to buy fuel cell and hybrid vehicles. *Id.* The Department of Energy is working with 14 industry groups to find alternative means of using and conserving fuel. *Id.* In 2002, the President called for voluntary reductions in greenhouse gas emissions, to which industry groups have responded, with the goal of reducing such emissions equivalent "to taking 70 million (or one out of three) cars off the road" over a ten-year period. *Id.* Also, in 2002 the Environmental Protection Agency launched its Climate Leaders program. Under this program, "more than 40 companies from almost all of the most energy-intensive industry sectors" have agreed to work with the agency in setting aggressive emission reduction goals and reporting their progress. *Id.* As a testament to the effectiveness of volunteer programs, the agency's Energy Star program is an example. Energy Star is a voluntary labeling program informing consumers about energy efficient products. *Id.* Under this program, more than 750 million Energy Star products crossing more than 30 product categories have been purchased from 1993 to 2003. *Id.* Reductions of greenhouse gas emissions from these products were the equivalent of removing 10 million cars from the street in one year. *Id.*

In addition, the Environmental Protection Agency has partnerships with natural gas companies, landfills, and coal mining interests to reduce and recapture methane emissions. *Id.* Other agency partnerships are resulting in drastic reductions of the most potent greenhouse gases, including sulfur, hexafluoride, per fluorocarbons, and hydrofluorocarbons. *Id.* Beyond this, the Administration is setting up a national greenhouse gas registry to aid in future voluntary or mandatory emissions reductions and to facilitate emission credits and trades. *Id.* The Environmental Protection Agency and other

government agencies are also working with research groups to develop cleaner fuels and more efficient cars and other modes of transportation. *Id.* at 52932-33.

This overall approach lends credence to the Environmental Protection Agency's claim that it would be counterproductive to address carbon dioxide emissions piecemeal through the Clean Air Act. According to the agency, unilateral regulation of vehicle emissions, as Petitioners seek, would weaken, not strengthen, "U.S. efforts to persuade key developing countries to reduce the GHG [greenhouse gas] intensities of their economies." *Id.* at 52931. Because of the large populations and growing economies of some developing nations, these countries often allow their emissions to increase precisely *because* the United States is decreasing its emissions. *Id.* This was the case when the United States sought to control substances that deplete stratospheric ozone. "Over time, U.S. emission reductions were more than offset by emission increases in other countries." *Id.* at n.5.

It was concern for this phenomenon that has resulted in consistent congressional rejection of strict regulatory approaches to carbon dioxide emissions in the United States. While the Kyoto Protocol was being negotiated, the Senate voted 95 to 0 that the United States would not sign on to any protocol that would limit United States greenhouse gas emissions—particularly carbon dioxide—unless the protocol set specific and scheduled emission limitations for developing countries. *Id.* at 52927. This action would have been strange if Congress had expected drastic carbon dioxide reductions from the regulation of "air pollutants" under the Clean Air Act, which the Petitioners hope to achieve by this suit.

Since enactment of the Clean Air Act amendments in 1990, "numerous bills to control GHG [greenhouse gas] emissions from mobile and stationary sources have failed to win passage." *Id.* at 52928. However, one day after the adoption of the 1990 amendments, Congress passed the Global Change Research Act

that established the Committee on Earth and Environmental Sciences to coordinate a ten-year research program on global warming. *Id.* at 52927. In that same year, Congress promulgated Title XXIV of the Food and Agricultural Act to investigate climate change implications for agriculture. *Id.*

Taken together, these actions suggest a need for a broad and coordinated approach to global warming issues and exhibit congressional intent to address these issues through means other than the Clean Air Act. Thus, if this Court reaches the merits of the case, this Court should conclude that Congress did not intend to regulate carbon dioxide as an "air pollutant" under section 202(a)(1) of the Act. "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Food and Drug Administration*, 529 U.S. at 160.

CONCLUSION

For the foregoing reasons, this Court should either dismiss the case for lack of standing, or uphold the EPA Administrator's discretionary determination not to regulate carbon dioxide as an "air pollutant" under the Clean Air Act.

DATED: October, 2006.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation